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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 557

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants,

vs.

HARRISBURG TRUST COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants submit herewith their Jurisdictional Statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The Appellants refer this Honorable Court to the opinion of the United States Court of Appeals for the Third Circuit dated April 8, 1964, printed on Page 8 of the Appendix, the order of said United States Court of Appeals for the Third Circuit dated April 8, 1964, printed on Page 10 of the Appendix, the District Court's Memorandum of Decision dated June 26, 1963, printed on Page 11 of the Appendix and the Order of the District Court dated June 26, 1963, printed on Page 17 of the Appendix.

GROUNDS OF JURISDICTION

The Appellants submit and aver that this Appeal is authorized by 26 Statutes at Large Chapter 517, Page 827 (1891) of the Acts of Congress of the United States.

The case at bar involves the construction and application of the Constitution of the United States. The application of laws, rules, and principles in the case at bar have deprived the Appellants of due process of law. The Appellants submit that an examination of the record in this case will substantiate the Appellants' allegations that the Supreme Court of the United States has jurisdiction in this case.

The order appealed from in this matter is the order of the United States Court of Appeals for the Third Circuit dated April 8, 1964, (printed on Page 10 of the Appendix).

The Notice of Appeal to the Supreme Court of the United States was filed on July 6, 1964, in the United States District Court for the Middle District of Pennsylvania.

The issue before the Supreme Court of the United States involves the application of the Rules of Civil Procedure in the Federal Courts of the United States as authorized by the Constitution of the United States. The Appellants submit that the application of these rules have deprived them of due process of law.

In "Winters vs. People of State of New York", 333 U.S. 507, the Supreme Court held that if the application of a State Statute violated due process of law then such decision would be subject to a direct appeal to the Supreme Court.

In "Fay vs. Noia", 372 U.S. 413, the Supreme Court stated that the scope of due process of law not only comprehends the right to be heard but also procedural rights.

In "Boske vs. Comingore", 177 U.S. 459, the Supreme Court stated that the question of whether or not the Constitution of the United States allows certain regulations adopted by a governmental agency as having the force of law is one that involves the construction and application of the Constitution of the United States, within the meaning of the provision of the Acts of Congress of March 3, 1891, with respect to appeals to be taken from the District or Circuit Courts direct to the Supreme Court of the United States.

In "Wiley vs. Sinkler", 179 U.S. 58, the Supreme Court stated that a right which has for its foundation in the Constitution of the United States is a case involving a question which may be brought directly from the Circuit Court to the Supreme Court of the United States.

The Plaintiffs submit and aver that the application of the Federal Rules of Civil Procedure by the District Court, which ruling was affirmed by the United States Court of Appeals for the Third Circuit, has deprived the Appellants of due process of law and is a question involving the application of the Constitution of the United States.

QUESTION PRESENTED

Has the application of the Constitution of the United States, and the Rules of Court authorized thereunder, deprived the Plaintiffs of due process of law?

STATEMENT OF THE CASE

The proceedings in the Court below involve a suit by Grant Thorn, Genevieve U. Thorn; Grant Thorn, Genevieve U. Thorn and Samuel Uhlfelder, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; Grant Thorn, Genevieve U. Thorn and Samuel Uhlfelder, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation against Harrisburg Trust Company. The original suit in this matter was filed September 20, 1955, but was not prosecuted because Grant Thorn, one of the Plaintiffs and Trustees herein, was under a Federal Tax Lien, his assets were frozen and he was unable to obtain necessary funds in order to prosecute the case in question. On September 30, 1958, the present suit was filed within the applicable time allowed by the Statute of Limitations. The Defendant attempted to take the deposition of one of the Plaintiffs, Grant Thorn, but said Plaintiff was unable, because of illness and physical disability, to appear for said deposition. No attempt was made to take the deposi-

tion of any of the other Plaintiffs, and no attempt was made by the Defendants to obtain a trial date for a hearing on the merits of the case. On April 6, 1962, a hearing was held in the United States District Court for the Middle District of Pennsylvania on the Motion of the Defendant to dismiss the Plaintiffs' Complaint as a result of the failure of one of the Plaintiffs, Grant Thorn, to appear for a deposition. Although Mr. Thorn's doctor, as well as all of the Plaintiffs were in Court on said date, no testimony was requested or presented concerning Mr. Thorn's past or present physical condition and in connection with the reasons for his past failures to appear for depositions. On April 26, 1962, the trial Court entered an Order dismissing the Plaintiffs' case on the theory that the Plaintiff, Grant Thorn, willfully failed to appear at a deposition. This decision was appealed to the United States District Court for the Third Circuit and on February 28, 1963, the said Appellate Court affirmed the District Court after refusing to consider medical reports and affidavits concerning Grant Thorn's physical condition on the ground that such evidence should have been presented at the hearing before the District Court on April 6, 1962; and as same was not so introduced in the evidence at the hearing in the District Court, it could not be considered on appeal. The Circuit Court of Appeals, during the hearing on said appeal, advised counsel for the Plaintiffs that a request should be made to trial court under Federal Rules of Civil Procedure 60 (b) for opportunity to submit the evidence pertaining to Grant Thorn's physical condition and the reasons for his failure to appear at the depositions.

Prior counsel for the Plaintiffs then proceeded with a Motion in the United States District Court for the Middle District of Pennsylvania under the aforesaid Federal

Civil Rule 60 (b) and evidence was produced concerning Mr. Thorn's physical condition and the reasons for his failure to appear at the depositions. The District Court dismissed the Motion for three reasons: (1) Plaintiffs' failure to set forth good ground to vacate or set aside the Court's Order for either inadvertance and/or excusable neglect; (2) Because the Motion was not timely filed; and (3) Because there was no leave of the United States Circuit Court of Appeals for the Third Circuit sought or granted in order to proceed in the District Court on the aforesaid Motion.

The United States Circuit Court of Appeals for the Third Circuit, by its opinion of April 8, 1964, (printed on Page 10 of the Appendix), and without discussing the important constitutional questions, affirmed the Order of the District Court by stating "that there is warrant on the record for the District Court decision".

The Appellants submit that the decision of the District Court (printed on Page 17 of the Appendix), which was affirmed by the United States Circuit Court of Appeals for the Third Circuit, was an arbitrary and capricious application of the Federal Rules authorized by the Constitution of the United States thereby depriving the Plaintiffs' of their rights of due process of law.

Without going into the merits of the Plaintiff's, Grant Thorn's, argument that he was not guilty of willful failure to appear at the depositions in question (which argument is not in our opinion proper in a Statement of Jurisdiction in the Supreme Court of the United States) and even assuming arguendo that the said Grant Thorn was guilty of the "willful failure" placing him in default under the Federal Rules of Civil Procedure, this default on part of

one of the Plaintiffs should not subject all of the other innocent Plaintiffs to a default order thereby depriving them of their constitutional rights to a hearing on the merits of their case.

The District Court in dismissing all of the Plaintiffs attempted to rule out the Plaintiffs argument and their evidence on the theory that the Plaintiffs did not apply to the Circuit Court of Appeals for permission before filing a motion under the Federal Rule of Civil Procedure 60 (b) in the Disfrict Court.

However, the attorney that represented the Plaintiffs at the time was under the impression that the Circuit Court of Appeals had granted such permission and furthermore (as discussed in 7 Moore's Federal Practice, Second Edition, Paragraph 60.30 (2) Page 339) there are times when the District Court has the power to proceed under 60 (b) without leave of the Appellate Court.

Without discussing the merits of the Plaintiffs' argument that their Motion under 60 (b) was timely filed, we feel that the Trial Court and the Appellate Court consideration of such issues was arbitrary, capricious, unsupported by law and evidence, unconstitutional, and thereby deprived the Plaintiffs of their rights to due process of law under the Constitution of the United States.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The Appellants sincerely and respectfully submit and aver that a full consideration of all aspects of the case at bar will reveal a violation of the Constitution of the United States for the reasons and under the authorities previously cited in this Jurisdictional Statement.

The Appellants submit that this Appeal brings before the Court substantial Federal Questions which require plenary consideration, with briefs on the merits of the case, and oral argument for their resolution.

Respectfully submitted,

HARRY S. SHAPIRO,
Attorney for Appellants,
253 Equitable Building,
Baltimore, Maryland 21202.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

OPINION OF COURT

(Filed April 8, 1964)

PER CURIAM.

The first suit in this matter was filed September 20, 1955. Plaintiffs took no further steps concerning it for nearly four years and on June 17, 1959 it was dismissed for lack of prosecution. On September 30, 1958, just prior to the expiration of the applicable statute of limitations, the present action was filed. This sets out substantially the same cause as did the original complaint. After answer, plaintiffs made no move until May 17, 1960, when they had the case put on the trial list. On October 10, 1961, defendant noticed plaintiff Grant Thorn for a deposition, to be taken November 1, 1961. At the call of the trial list, an attorney said he had been informed Mr. Thorn was ill and would be unable to appear for the taking of his deposition on November 1, 1961. There was nothing filed in justification of this. Later Mr. Thorn was served with notice for the taking of his deposition on February 14, 1962. Thorn thereafter telegraphed that the deposition should be cancelled as he was ill and would not be present. Again, nothing was filed in support of such action. On March 2, 1962, defendant filed a motion to dismiss the complaint as to plaintiff Grant Thorn and a motion to dismiss the complaint for failure to prosecute. The motions were heard on April 6, 1962. All plaintiffs were in court with counsel. No counter affidavits or oral evidence was offered on behalf

of the plaintiffs. On April 26, 1962, a Memorandum of Decision and Order was filed by the court, dismissing the complaint as to Grant Thorn for wilful failure to appear for deposition after proper notice and as to all the plaintiffs for failure to prosecute. This was appealed. On February 28, 1963, this court affirmed. On April 24, 1963, plaintiffs filed a motion under F.R.C.P. 60(b) to set aside the district court order. That was heard and on June 26, 1963 the court entered a Memorandum of Decision denying the motion. It is from the latter that this appeal was taken.

Judge Follmer, in the district court, dismissed this motion for three reasons: plaintiffs' failure to set forth good ground to vacate or set aside the court's order for either inadvertence and/or excusable neglect; because the motion was not timely filed; because there was no leave of this court sought or granted to proceed in the district court on this motion which concerns the district court order of April 26, 1962, heretofore affirmed by this court. From our own study of this long drawn out litigation there is warrant in the record for the district court decision on all three of its stated grounds and the court was well within its discretion in so deciding.

The order of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURTS OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,568

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants,

vs.

HARRISBURG TRUST COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 26, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

ATTEST:
IDA O. CRESKOFF,
Clerk.

April 8, 1964

District Court's Memorandum of Decision of June 26, 1963.

(Filed June 26, 1963.)

MEMORANDUM

This matter is before the Court on motion of plaintiffs to vacate and set aside the final judgment entered against the plaintiffs herein on April 26, 1962, under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the cause of action was dismissed due to inadvertence and/or excusable neglect on the part of plaintiffs and specifically the extreme ill-health of plaintiff, Grant Thorn.

Plaintiffs appealed the above referred to Order of this Court dismissing the cause of action with prejudice and on February 28, 1963, the action of this Court was affirmed in a shortage *per curiam*.

Plaintiffs' motion must be refused for a variety of reasons.

(a). This Court is powerless to take any action respecting its Order of April 26, 1962, as affirmed by the Court of Appeals on February 28, 1963, without leave of the Court of Appeals.

7 Moore's F. P. 2d Ed., ¶ 60.30(2), at page 339, states:

> "Where the appellate court has affirmed or reversed, then relief by the district court under 60(b) must reckon with the appellate court's mandate. 'The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the District Court, after remand, can take no further action.' At times a motion for relief will not raise matters that are within the compass of the mandate, and in that

event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court. But where the action which the district court is asked to take under 60(b) would disturb the judgment which the appellate court's mandate ordered, or would otherwise be inconsistent with the mandate, the general doctrine is that the district court lacks power to proceed with the motion unless and until leave is granted by the appropriate appellate court. * * *"

Along the same line is the opinion of the Court in Butcher & Sherrerd *et al.* v. Welsh *et al.*, 3 Cir., 206 F.2d 259, 262 (1953), as follows:

"Respondent contends that recent amendments to Rule 60(b) of the Federal Rules of Civil Procedure confer upon the trial court the power to grant relief from the operation of a judgment without prior approval of the appellate court. We cannot subscribe to this contention. Rule 60(b), while enlarging the power of the District Courts over judgments without respect to the running of the term of court, does not confer upon District Courts the power to alter or amend a judgment which has been affirmed by this court or the Supreme Court, for such alteration would affect the decision of the reviewing court, which it is not within the power of the District Courts to do. * * * Further, we have already had occasion to hold that the 1948 amendments to the Rule, relied upon by respondent, did not change its effect in this respect. * * *"

In this case plaintiffs have not obtained, nor even sought to obtain, leave of the Court of Appeals to file the instant motion. The motion must be denied for this reason.

(b). Plaintiffs' motion has not been timely filed.

Rule 60(b) provides that a motion under reason (1) thereof seeking relief from an order or judgment because of inadvertence or excusable neglect, *inter alia*, "* * * shall be made within a reasonable time, and * * * not more than one year after the judgment, order or proceeding was entered or taken."

With respect to this time limitation, 7 Moore's F. P. 2d Ed., ¶ 60.28(2), pp. 319 and 320, states:

> "If a motion for relief under clause (1), * * * is not made within a reasonable time it will be denied, although made within the one year period. While the 'reasonable time' limitation may cut down the one year period, it cannot, however, enlarge that period, for a motion for relief under clause (1) * * * is subject to a maximum one year period, computed generally from the entry of the final judgment, and, in general, that time is not enlarged by the taking of an appeal."

In the event an appeal is taken and grounds then exist or are subsequently discovered which should be considered on an application for relief from the Order of the District Court under Rule 60(b), it has been held in this circuit that the proper procedure is the filing of a motion in the appellate court asking permission to submit to the trial court a motion under Rule 60 (b). Zig Zag Spring Co. v. Comfort Spring Corp., *et al.*, 3 Cir. 200 F.2d 901 (1953).

It is clear from the record in this case, from the affidavits submitted to the Court of Appeals and in support of the instant motion, that all of the facts upon which the instant motion is based were known to plaintiffs prior to the entry of the Order of dismissal by this Court on April 26, 1962.

On April 24, 1963, two days before the running of the maximum time within which a Rule 60(b) motion could be filed, plaintiffs filed the instant motion to vacate. In addition, the plaintiffs waited for two months after the filing of the *per curiam* opinion of the Court of Appeals (February 28, 1963) before filing the instant motion. Plaintiffs' history of inexcusable delay and complete disregard for the Court which was set forth in detail in our Memorandum of April 26, 1962, is continued in the present proceeding.

Plaintiffs have totally failed to justify their tardiness in filing the instant motion. It will be denied for this reason.

(c). In their motion or affidavits plaintiffs have failed to set forth good ground to vacate or set aside the Court's Order for either inadvertence and/or excusable neglect.

In Frank v. New Amsterdam Casualty Co., D. C. E. D. Pa., 27 F. R. D. 258, 259 (1961), Judge Lord said, "Defendant contends that its counsel's omission constitutes excusable neglect within the term of Fed. R. Civ. P. 60(b) (1). The Court finds that the defendant's view is untenable. An omission or any carelessness on the part of counsel does not automatically constitute 'excusable neglect' as the term is employed in Fed. R. Civ. P. 60(b) (1)." The Court then cites Ledwith v. Storkan, D. C. Neb., 2 F. R. D. 539 (1942), as the leading case on this matter as follows:

> "The leading case of Ledwith v. Storkan, *supra*, enunciates the basic proposition that the moving party must articulate the specific reasons which constitute excusable neglect. The defendant has only offered a general conclusion; it has not offered any extenuating circumstances or reasons surrounding counsel's failure to follow instructions. This Court therefore concludes

> that this omission, without a further showing of extenuation, does not constitute 'excusable neglect' within the purview of Fed. R. Civ. P. 60 (b) (1)."

In view of the long history of delays; failure to appear; disregard of all the rules not only of the Court but common ordinary decency as well; the withdrawal of their local counsel; the failure to follow through with explanations for nonappearance or delay; the failure of the other plaintiffs to act if the one vocal plaintiff, Grant Thorn, was too ill to act; Thorn's failure to make a timely application for continuance; failure of any of the plaintiffs to bring to the Court's attention, before or after the hearing on April 6, 1962, the material on which they now seek to rely; the failure on April 6, 1962, to request a continuance or at least to submit affidavits subsequent thereto, to characterize plaintiffs' conduct here even as "inexcusable neglect" is to grossly understate the facts. For this reason the motion to vacate must be denied.

Rule 30(b) of the Federal Rules of Civil Procedure provides, *inter alia*, as follows:

> "After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, * * * or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

As to the sanctions to be applied in case of the deliberate ignoring of this Rule, 4 Moore's F. P. 2d Ed., ¶ 30.16, p. 2044, states, "Nor may a party complain of the action of the court in imposing sanctions under Rule 37 for his failure to appear and give his deposition in response to a proper notice, where he has made no motion under Rule 30(b)."

Furthermore, Rule 30(b) provides that the motion for relief be "seasonably made." At page 2024, 4 Moore's F. P. 2d Ed., ¶ 30.05, the following statement appears, "'Seasonably' means as soon as the party or deponent learns that he will need a protective order of the court."

In the instant case this Rule was grossly violated.

Plaintiffs have also utterly failed to show any valid ground why the motion to dismiss for failure to prosecute under Rule 41(b) should not have been granted.

For the first time in this eight year litigation in their brief filed in the Court of Appeals plaintiffs asserted a reason for their failure to sooner prosecute their actions, to wit:

> "During the years 1952 to 1958, the Appellants were under a jeopardy tax lien with no evasion charged and no penalties assessed and in litigation with the Internal Revenue Service of the United States Government. Shortly before the tax lien matter was settled and shortly prior to the expiration of the applicable statute of limitations, the present suit was filed on September 30, 1958. During the next two years, conferences were held between counsel for each side and the parties, but efforts to work out a settlement proved unsuccessful." (Page 3).

Then at pages 16 and 17, plaintiffs state that:

> "* * * the long delay in the disposition of the matter was attributable to conditions beyond the control of the Appellants; firstly, the jeopardy tax lien which prevented them from prosecuting any civil action wherein money damages would result; and secondly, the ill health of the Appellant, Grant Thorn, who is the principal witness, for the Appellants."

Whether plaintiffs did or did not owe this tax of course is of no consequence here and requires no comment.

For the reasons above stated, plaintiffs' motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside final judgment will be denied.

/s/ FREDERICK V. FOLLMER,

United States District Judge.

June 26, 1963

* * * * * *

ORDER

NOW, June 26, 1963, in accordance with Memorandum this day filed, plaintiffs motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside final judgment entered by this Court against plaintiffs on April 26, 1962, be and the same is hereby denied.

/s/ FREDERICK V. FOLLMER,

United States District Judge.